BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Mpower *et al.* Request	)	WC Docket No. 12-353
To Refresh the Record and Take	)	
Expedited Action to Update	)	RM - 11358
Copper Retirement Rules	)	
	)	

COMMENTS OF THE
UNITED STATES TELECOM ASSOCIATION

Pursuant to the Commission's *Public Notice*[1], the United States Telecom Association ("USTelecom") hereby responds to the January 25, 2012 letter from Mpower and others requesting that the Commission adopt new rules concerning the retirement of copper facilities from incumbent local exchange carrier ("ILEC") networks.[2]

The *CLEC Letter* urges the Commission to dramatically change its existing policies to fix an alleged problem they admit is not – if it even exists – caused by the existing rules. That inconsistency notwithstanding, the thrust of the *CLEC Letter* appears to urge the Commission to adopt new rules requiring virtually all copper network plant to be left in place indefinitely even after incumbent LECs upgrade their networks to fiber and no longer need the copper for

[1] "Wireline Competition Bureau Seeks Comment on Request to Refresh Record and Amend the Commission's Copper Retirement Rules," Public Notice, DA 13-147 (Feb. 4, 2013).

[2] Letter to Marlene Dortch, Secretary, FCC, from Eric Branfman, Bingham McCutcheon LLP, on behalf of Mpower Communications Corp., U.S. TelePacific Corp., CAN Communications, Inc., Level 3 Communications, LLC, TDS Metrocom, LLC and Telecommunications for the Deaf and Hard of Hearing, Inc. (Jan. 25, 2013) ("*CLEC Letter*").

purposes of serving their own customers. The Commission should summarily reject this request as fundamentally at odds with long-standing Commission policy favoring the deployment of robust, facilities-based broadband service to all Americans and of encouraging investment in fiber and other next-generation broadband networks. Requiring companies to bear the substantial costs of maintaining a redundant, aging copper network after fiber is deployed would directly undermine the Commission's ambitious broadband goals.

DISCUSSION

The *CLEC Letter* appears to urge the Commission to require all copper facilities to be maintained by incumbents LECs indefinitely regardless of whether the facilities are being used, in order that the networks might be left available for competitors seeking to provide Ethernet-over-Copper ("EoC") broadband services to business customers. But this request runs directly counter to both the factual and policy determinations reached by the Commission in the *Triennial Review Order*. In that proceeding, the Commission expressly found that competitive and incumbent LECs faced the same burdens, as well as the same revenue opportunities, when deploying fiber loop facilities.[3] Accordingly, the Commission concluded that, at least where a CLEC is seeking to offer broadband services, it cannot be considered "impaired" without access to the copper loop. Therefore, the Commission expressly ruled that ILECs are allowed to retire copper facilities when deploying fiber loops following notice to the agency and affected competitors.[4]

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[3] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, 18 FCC Rcd 16978, at paras. 275-76 (2003) ("*Triennial Review Order*").

[4] *Id.* paras. 281-82.

The *CLEC Letter* acknowledges that the Commission already has rules establishing notice procedures for the retirement of copper plant that were adopted after an extensive rulemaking.[5] And while offering up speculative concerns, the *CLEC Letter* does not offer any factual basis to explain how these rules have proven inadequate in practice. The facts demonstrate that the Commission should not make the changes that the *CLEC Letter* urges.

First, as USTelecom noted in its *Petition for Forbearance*, the network change process – which includes the copper retirement notice process – has rarely led to the filing of oppositions and, in the few instances where it has, those concerns have been resolved by the parties.[6] During calendar year 2012, for example, the three largest ILECs filed 89 network change notifications pursuant to the Commission's rules, *and not a single objection was filed in connection with any of these*.

Moreover, since the Commission's determination in the *Triennial Review Order* that broadband investment would be encouraged by a regime that denied unbundling for new broadband facilities and allowed providers the flexibility to retire legacy facilities no longer needed to serve their customers, companies have invested billions of dollars in broadband infrastructure. They did this as a result of, and in reliance on, the Commission's policies to encourage fiber investment. These investments further the Commission's broadband goals and have provided the benefits of increased competition to millions of consumers, particularly by

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[5] *CLEC Letter* at 20.

[6] See, *Petition of* USTelecom *for Forbearance Under §160(c) from Enforcement of Certain Legacy Telecommunications Regulations*, WC Docket No. 12-61 (filed Feb. 16, 2012); *Reply Comments of the United States Telecomm Association*, WC Docket No. 12-61 at p. 29 (noting that a survey of AT&T, Verizon and legacy-Qwest found that between 2007-2011, those companies filed a combined 578 short-term change notifications of which *three* led to objections being filed with the Commission – some or all of which were subsequently withdrawn).

facilitating the ability of ILECS to compete with cable incumbents which continue to have the dominant share of broadband customers. Customers are rapidly gaining access to enhanced services through the rapid (and growing) deployment of fiber and other broadband capable facilities from an increasing number of providers. Far from losing access to traditional voice service or limiting their options, the industry landscape following the *Triennial Review Order* has quickly expanded to provide consumers with many more communications options than ever before.

While largely ignoring these legal and policy precedents, the *CLEC Letter* points to several Commission statements they claim to support their request. But none of these statements provides a basis for reversing the Commission's long-standing policies, nor are they consistent with the relief the CLECs are seeking.

1. *The CLEC Letter urges the adoption of new rules as being consistent with the Commission's finding that broadband is economically challenging to deploy in "many unserved and underserved areas" and that the Commission should pursue the directive of Section 706 to "accelerate deployment of such capability by removing barriers to infrastructure investment…."*[7]

USTelecom and its member companies whole-heartedly agree with the Commission's focus on extending broadband to unserved and underserved areas of the country. Indeed, USTelecom's member companies have invested billions of dollars in deploying broadband across the country, and have urged the Commission to adopt rules implementing the *Connect America Fund* to ensure that these funds are quickly and efficiently made available so that facilities-based providers may invest in bringing robust broadband networks to unserved and underserved areas.

[7] *CLEC Letter* at 2.

As the Commission has observed, CLECs have the same opportunity to deploy broadband networks to historically unserved and underserved areas as do incumbents.[8] But instead of taking on this challenge, the CLEC industry by and large has avoided deploying services and facilities in those areas the Commission has deemed unserved or underserved and instead has – as the *CLEC Letter* itself explains – chosen to "concentrate their deployment of competitive facilities in geographic areas where the demand for service is highest and most concentrated …."[9] Indeed, while the *CLEC Letter* cloaks itself in the cloth of the "19 million Americans [that] live in areas where broadband is not physically deployed,"[10] the CLEC Petitioners appear to offer facilities-based consumer services to very few residences. And as a factual matter, the EoC technology that the CLECs tout has similar distance constraints as DSL and is thus highly unlikely to be deployed in low-density, long-loop areas of the country – the very areas that are most likely to be unserved or underserved. Indeed, the business plans of most CLECs are based upon targeting the most profitable business customers in low-cost areas.[11]

2. *The CLEC Letter acknowledges that fiber is a preferable medium to copper for delivering high-speed broadband services, but can be difficult and expensive to deploy.[12] As a result, the CLEC Letter argues that the copper retirement rules must be modified because "ILECs have elected to forego*

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[8] *Triennial Review Order* at paras. 275-276.

[9] *CLEC Letter* at 6.

[10] *Id.* at 5.

[11] Petitioner ACN appears to be a multi-level marketing company that primarily resells products from a number of service providers through independent marketers, including broadband from cable and fixed wireless companies. In this context, it appears that ACN views the facilities-based services of cable and fixed-wireless companies to be adequate alternatives to the ILEC facilities. *See*, http://www.acninc.com/acn/us/index.html.

[12] *CLEC Letter* at 9.

deploying fiber" in many areas and therefore, copper "will remain a prevalent and important part of the network for some time." [13]

The *CLEC Letter* seems to suggest that the copper retirement rules must be changed because fiber is not being deployed everywhere. But the CLECs' argument is a *non-sequiter*. The absence of fiber everywhere is irrelevant to the areas where fiber has already been deployed and where the legacy copper networks are now, or will become, duplicative and redundant. That fiber may not have been deployed in *other* areas has no bearing on what providers are permitted to do with their no longer used copper *in areas where fiber has been deployed*.

At the outset, it is exceeding strange that the *CLEC Letter* is built on the proposition that in the absence of a copper or fiber facility from an ILEC, customers would largely be without competitive choice for high-capacity services. Indeed, the *CLEC Letter* utterly ignores the fact that cable companies have the dominant share of residential broadband customers. Moreover, cable facilities offering bandwidths typically greater than what can be provided over EoC technology are already deployed to more than 90% of residences and at least 75% of small and mid-size businesses throughout the country.[14] This omission is particularly odd given that the Commission recently granted a request supported by the CLEC Petitioners to facilitate combinations between CLECs and cable companies so that CLECs could more readily use the

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[13] *Id.* at 7.

[14] *See, e.g.*, National Cable and Telecommunications Association, http://www.ncta.com/StatsGroup/Availability.aspx , (stating that cable company provided high-speed Internet services are available to 93% of American households); "Cable's Cut of the Biz Services Pie to Eclipse $7B," Jeff Baumgartner, Light Reading Cable News Analysis (Nov. 29, 2012) (available at: http://www.lightreading.com/fttx/cables-cut-of-the-biz--services-pie-to-eclipse-7b/240143482#).

cable companies' "expansive – and in some areas, ubiquitous – network facilities" to provide service to business customers.[15]

Of course, where ILECs are deploying new fiber, they are incurring precisely the costs that the *CLEC Letter* identifies as "daunting."[16] Indeed, as the Commission emphasized in the *Triennial Review Order*, the costs and burdens of deploying new fiber facilities are fundamentally the same for both ILECs and CLECs. Yet what the *CLEC Letter* suggests is that the Commission should require that, in addition to these deployment costs, ILECs should also be required to bear the costs of maintaining unused and redundant copper. These costs are significant and would necessarily dis-incent fiber deployment – which even the *CLEC Letter* concedes is "the ideal solution" and an express policy goal of the Commission.[17]

Indeed, adopting a policy that is designed to subsidize the non-facilities-based broadband services espoused in the *CLEC Letter* (which typically have peak speeds of around 15 Mbps – much slower than fiber or coaxial cable) at the expense of dis-incenting fiber-based facilities deployment directly contradicts the *National Broadband Plan's* goal of having at least 100 Mbps service to 100 million U.S. homes,[18] as well as to Chairman Genachowski's recent advocacy on

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[15] *Petition for Forbearance from Section 652 of the Communications Act for Transactions Between Competitive Local Exchange Carriers and Cable Operators*, WC Docket No. 11-118, Order, FCC 12-111, p. 14 (Sep. 17, 2012). *See*, Comments of U.S. TelePacific Corp., et al., WC Docket No. 11-118 (filed Aug. 22, 2011) ("the uncertainty surrounding the application of Section 652…has clearly been a deterrent to transactions whereby a cable operator and a CLEC might combine to be able to offer a "triple play" bundled service in competition with the voice, broadband and, increasingly, video distribution services of the ILEC in their region.").

[16] *CLEC Letter* at 7.

[17] *Id.* at 9.

[18] *Connecting America: The National Broadband Plan*, Federal Communications Commission, at p. xiv (Mar. 16, 2010) ("*National Broadband Plan*").

the critical need to accelerate the creation of a critical mass of markets with ultra-fast Gigabit speed networks.[19]

3. *The CLEC Letter selectively quotes the National Broadband Plan as supporting its proposal to prohibit any right of ILECs "to remove copper from the ground (or poles)."*[20]

Not surprisingly, the *CLEC Letter* cuts off the part of the *National Broadband Plan's* recommendation which immediately follows the language it quotes. As the *National Broadband Plan* went on to caution:

> Incumbent deployment of fiber offers consumers much greater potential speeds and service offerings that are not generally possible over copper loops. In addition, *fiber is generally less expensive to maintain than copper*. As a result, requiring an incumbent to maintain two networks – one copper and one fiber – would be costly, possibly inefficient and *reduce the incentive for incumbents to deploy fiber facilities*.[21]

Indeed, the *National Broadband Plan* went on to reiterate this concern more strongly when it explained that requirements to maintain the legacy networks in place even as they upgrade to fiber are "not sustainable," and "can have a number of unintended consequences, including siphoning investments away from new networks and services."[22]

The *CLEC Letter* makes no mention of these costs, let alone explains how these costs of maintaining inactive copper in place might be recovered, or what the impact of those costs might be on consumers. Yet these costs are significant.

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[19] *See*, "FCC Chairman Julius Genachowski Issues Gigabit City Challenge to Providers, Local, and State Governments to Bring at Least One Ultra-Fast Gigabit Internet Community to Every State by 2015," FCC News Release (Jan. 18, 2013).

[20] *CLEC Letter* at 19-21.

[21] *National Broadband Plan*, Recommendation 4.9 at pp. 48-49 (emphasis added).

[22] *National Broadband Plan* at p. 59.

For example, copper lines that are left in place potentially remain subject to pole attachment assessments and rights-of-way fees. As the *National Broadband Plan* noted, pole attachment and right-of-way fees can constitute a significant portion of the cost of providing service.[23] Additionally, facilities owners must pay for maintenance, upkeep, and systems to monitor these unused lines. The CLECs apparently envision requiring the ILECs to continue to keep the now aging and in some cases decaying copper in good stead, spending substantial capital that could otherwise be used to expand and enhance broadband. And on top of these, the *CLEC Letter* proposes creating new costly burdens, including the creation and maintenance of extensive databases of abandoned copper, and allowing states to impose additional regulatory burdens on copper retirement.

By definition, copper left in place but not connected to an end-user means that there is no customer benefitting from the facility and, thus, no logical customer from which to recover the continuing maintenance and other recurring costs. Indeed, given that the number of customers being served by ILEC switched copper facilities is falling by more than 10% per year, the costs of maintaining unused copper will presumptively need to be recovered by an ever smaller number of consumers still taking TDM-based service. If the Commission mandates that ILECs incur costs by maintaining facilities that are not serving customers, it has an obligation to provide

[23] *Id.* at pp. 109-110. Additionally, if it were to consider granting the requested relief, it will be necessary for the Commission to clearly articulate the rights under which carriers are entitled to leave abandoned facilities on poles or rights-of-way, particularly where such abandonment could be considered inconsistent with contractual provisions between the ILEC and rights-of-way owners.

a cost-recovery mechanism that avoids having these consumers bear the ever-increasing share of costs for maintaining yesterday's unused infrastructure.[24]

The *CLEC Letter* also fails to take on numerous other questions that the Commission would need to address. Would copper facilities have to be maintained in place forever irrespective of requests for access? If not, for how long? Would ILECs be required to abandon in place copper facilities which have decayed to the point where they are no longer adequate for providing quality services? Would they have to maintain in place copper loops that are too long to be able to provide broadband services, including EoC? Would they be required to maintain abandoned copper to those customers and in those areas where CLECs have demonstrated they have no intent of ever serving, including the vast majority of residential consumers? The potential costs associated with these questions are enormous and, as the *National Broadband Plan* warns, will only serve to discourage the deployment of high-capacity fiber facilities.

CONCLUSION

For the foregoing reasons, the Commission should decline to take any of the actions urged in the *CLEC Letter*.

Respectfully submitted,

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[24] Failure to provide a means of recovering these maintenance costs, as well as the intrinsic value of the copper facilities, would constitute a Fifth Amendment takings.